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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:25-10-2006

CORAM

THE HONOURABLE MR.JUSTICE S.ASHOK KUMAR

C.M.S.A.No.28 of 2006

G.Sumathi ... Appellant/ 3rd Party

Versus

1.Arumugham
2.Balamurugan ... Respondent / Decree Holder
Judgment Debtor

This Civil Miscellaneous Second Appeal filed under Order 43 Rule 1 r/w Section 100 of the Civil Procedure Code against the judgement and decree dated 29.03.2006 made in A.S.No.72 of 2005 on the file of the Principal District Judge, Cuddalore confirming the judgement and decree, dated 04.07.2005, made in E.A.No.218 of 2001 in E.P.16 of 2000 in O.S.No.223 of 1997 on the file of the Subordinate Judge,Cuddalore.

For Appellant : Mr.R.Gururaj
For Respondents : Mr.R.Sunilkumar

JUDGEMENT

This civil miscellaneous second appeal has been filed against the judgement and decree dated 29.03.2006 made in A.S.No.72 of 2005 on the file of the District Judge, Cuddalore, confirming the judgement and decree, dated 04.07.2005, made in E.A.No.218 of 2001 in E.P.16 of 2000 in O.S.No.223 of 1997 on the file of the Subordinate Judge,Cuddalore.

2.Brief facts of the case are as follows:

The appellant has purchased a house property from the second respondent. The first respondent as creditor to second respondent filed O.S.No.223 of 1998 on 15.7.1998. The suit was decreed on 28.10.1999, and an order of attachment of the property was made on 18.1.2001. While so, the appellant purchased the property from the second respondent on 26.2.2001 in pursuance of an alleged sale agreement dated 1.7.1998. Now at this stage, in pursuance of the decree in O.S.No.223 of 1998 and the subsequent attachment, by which the property was brought to sale, in E.P.No.16 of 2001, the appellant filed E.A.No.218 of 2001. The E.P.No.16 of 2001 for attachment and sale of the property was posted for hearing and

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subsequently adjourned on several dates. At this stage, the petitioner filed the present petition to raise the attachment and sale of the property. The learned Subordinate Judge dismissed the petition on the ground that the petition is filed in collusion with the second respondent to defeat the decree obtained by the first respondent.

3.Aggrieved over the same, the appellant filed A.S.No.72 of 2005. It was also dismissed on the same ground. Aggrieved over the same, this civil miscellaneous second appeal is filed by the appellant.

4.Mr.R.Gururaj, the learned counsel appearing for the appellant would contend that the court below did not properly consider the fact that a notice is must to the bonafide purchaser; but, no notice was served on the purchaser prior to the attachment and also the fact that the purchase is in good faith. Therefore, the sale should not be set aside, and the property should not be sold in auction for the reason adduced by the lower Court to the extent that the first respondent and the second respondent colluded each other to defeat the right of the appellant.

5.Per contra, Mr.R.Sunilkumar, the learned counsel appearing for the respondents would contend that to defeat the right of the first respondent, the judgement debtor sold the property after decree, and the sale deed has been executed after attachment, and therefore, under Section 64 C.P.C., the sale is null and void.

6.The following dates are most important for consideration:

(a) The date of filing of the suit in O.S.No.223 of 1998 is 15.7.1998.
(b) The date of decree is 28.10.1999.
(c) The date of attachment of the property is 18.1.2001.
(d) The sale deed was executed on 26.2.2001.

7.A perusal of the sale deed would show that there was an agreement of sale on 1.7.1998 executed by the second respondent in favour of the appellant. The alleged sale agreement has not seen the light of the day. Apart from that, neither original nor the copy of the same was produced before the court. In this regard, the explanation on the part of the appellant is that after execution of sale deed, he returned back the sale agreement to the vendor. No reason whatsoever is attributed as to why the agreement of sale was returned to the vendor after execution of sale deed, and there is also no explanation as to why if actually there was a sale agreement dated 1.7.1998, no sale was effectd for nearly three years.

8.The contention of the learned counsel appearing for the appellant is that he is a bonafide purchaser, and no notice of

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attachment of the property before purchase, was issued. He has produced Exs.A1 to A3, three encumbrance certificates up to 10.1.2001 only. The attachment was made on 18.1.2001. Therefore, naturally the encumbrance certificates obtained in Ex.A1 to A3 up to 10.1.2001 will not reveal the attachment of the property, and after attachment, the copy of the attachment order was also sent to the Sub Registrar, Cuddalore.

9.The petitioner has not taken any encumbrance certificate after 18.1.2001 or prior to the execution of sale deed. Therefore, the reliance on Exs.A1 to A3 that the appellant is a bonafide purchaser is of no use. It is nothing but the wilful and wanton act on the part of the petitioner by avoiding the encumbrance certificate after 18.1.2001. It is the case of the appellant that the second respondent should have produced the encumbrance certificate. The second respondent who received attachment notice, would have naturally informed the appellant that the sale is subsequent after the attachment. It is proved that the second respondent wilfully and wantonly in collusion with the appellant did not do so. Therefore, the failure to produce the sale agreement dated 1.7.1998 would show that the alleged sale agreement was not in existence. The alleged sale agreement is out and out, an antedated document created to defeat the rights of the petitioner. The sale deed has been executed by the second respondent in favour of the first respondent only after the attachment by court.

10.No doubt, the appellant was in possession of the property and proved the same by some documents like gas connection receipt and some other documents like house tax receipts. These are documents to show that he is in possession. Admittedly, the appellant is in possession of the property as a tenant. But, that possession does not confer any title over the property.

11.The learned counsel appearing for the appellant would cite several decisions of the Honourable Supreme Court of India as well as the High Courts for consideration of the issue under Section 53 of the Transfer of property Act. They are not applicable to the facts of this case.

(1)1991 (2)L.W.44 (P.Srinivasan v. Suseelabai and others).
(2)1966 (1)MLJ 413)(DB) (Padmavathi Ammal vs. M.Maruthachalam Pillai and others).
(3)AIR 1970 SC 1717 (Kedarnath Lal (dead) by his legal representatives and another v. Sheonarain and others).

12.These are all the cases on the facts which are totally different from the facts of this case. These are the cases where either the sale agreement was bonafide or the sale deed was

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executed to defeat the creditor by an insolvent. But, this is a case where the judgement-debtor in collusion with the appellant has executed the sale deed to defeat the right of the creditor who got a decree in the suit.

13. Section 64 C.P.C. reads as follows:

> "Whether an attachment has been made, any private transfer or delivery of the property attachment or of any interest therein and any payment to the judgement debtor of any debt, dividend or other moneys contrary to such attachment, shall be as against all claims enforceable under the attachment.
>
> "((2)Nothing in this Section apply to any private transfer or delivery of the property attached or of any interest therein, made in pursuance of any contract for such transfer or delivery entered into and registered before the attachment.)"

14.As per Section 64 C.P.C., if a party had any right prior to the attachment, such rights will not be affected by the subsequent attachment provided, the agreement was registered.

15.This is a case in which the alleged agreement was not registered. As already told, the evidence of such agreement is highly doubtful. Therefore, no right has been accrued on the appellant by the alleged sale agreement which has never seen the light of the day.

16.Any purchaser for consideration (even bonofide purchaser) however bonafide and even though he be totally unaware of the attachment, would, after attachment had been made of the property, take it subject only to the claim enforceable under the attachment. There is an embargo on the acquisition and enjoyment of property after an attachment even though there may be no actual notice of the attachment, notice being only constructive, to be inferred from the promulgation of the order of attachment as provided for under Order 21, Rule 54.

17.The learned Sub Judge, Cuddalore, has given sufficient reason as to why he came to the conclusion that the sale agreement dated 1.7.1998 is false and the sale deed has been executed in collusion with the appellant. The learned District Judge has also come to the same conclusion.

18.I do not find any reason to interfere with the judgement and decree of the learned Principal District Judge, Cuddalore. The appeal is only a vexatious attempt on the part of the appellant at the instance and in collution with the 2nd defendant.

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19.In the result this civil miscellaneous second appeal is dismissed with costs of Rs.5000/-.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

vk

To,

1.The Principal District Judge,Cuddalore.
2.The Subordinate Judge,Cuddalore.

1 cc to Mr.R.Sunilkumar, Advocate, Sr. 49993
1 cc to Mr.R.Gururaj, Advocate, Sr. 49635

C.M.S.A.No.28 of 2006

GM (CO)
kk 22/11

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